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AMERICAN DIVORCE LAW.

BY WILBUR LARREMORE.

A SECULAR writer may be pardoned for expressing regret that one of the great churches of America has recently assumed a reactionary policy on the subject of divorce, frowning upon the right of an innocent, as well as the guilty, party to remarry. From a temporal standpoint it is to be deplored that ecclesiastical influence cannot unite, to an extent at least, with that of the civil law in establishing a general standard of sexual morals. At the same time, the American spirit is to accord, not only liberty of conscience, but absolute personal respect, to one living up to his religious convictions. Reciprocally, our brethren in the church, whatever their personal scruples, should aid in, and not impede, the adoption of a workable basis of marriage and divorce for the government of the community at large. There is no subject which at the present time more imperatively calls for consistent application of the American theory of separation of church and state. Churchmen who are opposed to divorce on religious grounds will join too often in defeating any movement to liberalize divorce laws, even though communicants are left entirely free to observe their particular rules.

The writer believes that it would be a comparatively simple task to frame a divorce law for operation throughout the United States, which would conserve public morality and general happiness and be acceptable to average sentiment. We need look no farther than Massachusetts for its model, if not, indeed, for its final form. Bagehot and other foreign observers have singled out that State as offering the most successful example of popular government in America. It is safe to say that, in the estimation of Americans themselves, no other State would be ranked above it as a well-governed, law-abiding community; certainly

no one would venture to regard the Bay State as a land of easy morals. Yet its statutes prescribe, in addition to adultery, many other grounds for divorce—as, for example, cruel and abusive treatment; utter desertion for three consecutive years next before the filing of the libel; gross and confirmed habits of intoxication caused by voluntary and excessive use of intoxicating liquor, opium or other drugs; on libel of the wife, that the husband, being able, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her; sentence to confinement at hard labor for life, or for five years or more. After a divorce for the last cause no pardon restores conjugal rights. All divorces are absolute; either party may marry again, but the guilty party not within two years from the entry of the final decree.

The general distinction between the Massachusetts and New York policies is that the former State grants absolute divorces for what may be termed the secondary causes—cruelty, desertion, etc.—while as to them New York authorizes a limited divorce or separation. (Both States provide for absolute annulment or divorce for certain grounds affecting the marriage in its inception, such as impotency.) A recent decision of the Supreme Judicial Court of Massachusetts emphasizes its attitude towards the most important of the social relations. In *Franklin vs. Franklin* (February, 1906, 77 N. E., 48), it appeared that the plaintiff, a skilful mechanic, emigrated to this country from England “to better his condition in life,” leaving behind him in England his wife and children. Having concluded to remain, and some of his children having joined him here, he endeavored to induce his wife also to come and resume their matrimonial life. She refused to do so, although provided with the means, for no other reason than disinclination to leave her native land and the friends of her youth. On this state of facts the Massachusetts Court held the wife guilty of desertion, entitling the husband to a divorce. A portion of the opinion may well be quoted:

“The fundamental fact to be considered is that the husband, as head of the family, legally responsible for its support, has a right to choose and establish a domicile for himself and his wife and children. A refusal of the wife to stay with him in that domicile, without a sufficient reason for her refusal, is desertion. This right of the husband is not limited to the state or country in which the parties live at the time of

their marriage, but in these days of easy communication between different countries, and different parts of the same country, he may exercise it reasonably, in a way which will change his citizenship and allegiance. So far as he personally is concerned, if his duties to his wife are left out of consideration, this right is doubtless absolute. But in reference to the rights, duties, and liabilities of the parties in their marital relations it is not absolute. It should be exercised with some reference to the welfare of the wife. We can conceive of a choice of a domicile so plainly unreasonable and improper, in reference to the health and welfare of the wife, that the selection of it, and an attempted enforcement of his general marital right to have her share it with him, would be extreme cruelty, such as would justify her in declining to accompany him or follow him to such a place of abode. His wife's marital right and his duty as a husband would come in conflict with the exercise of his general right to choose his own domicile, if he attempted to exercise the right in such a way as would be utterly and grossly unreasonable because of the peril to her life and health, and perhaps because of her deprivation of other things essential to her welfare. But the determination of such matters must, in the first instance and ordinarily, be left to the husband, upon whom rests the legal duty to provide for his family, as well as for himself. The wife cannot legally refuse to accompany him in a change of domicile unless such a change is plainly unreasonable."

It is of interest to the State that the average citizen be monogamous and subjected to the responsibilities and restraints of domestic life. Which conduces more strongly to that end, the law of Massachusetts, or the civic sacramentalism of New York that condemns thousands of persons, whose legal spouses are impossible partners, to practical celibacy or sexual outlawry? Of course, divorce laws, whether liberal or strict, are subject to abuse; but this is no justification of purblind adherence to a system which ignores human nature and the very ends of civil matrimony. Let the State first set itself theoretically right, and it may then trust its courts to frustrate attempts to set aside or evade its laws.

Viewing the comparative legislation of the country, it will be found that the majority of the States approximate more or less closely to the Massachusetts policy. Very few of them restrict the causes of divorce to a single one, and not very many, on the other hand, sanction trifling or frivolous reasons. In the undeveloped civilization of mining camps prematurely created sovereign States, crudities, vagaries and venalities of legislation are only to be expected. Many years ago, the State of

Illinois enjoyed the notoriety of a free-and-easy divorce emporium, to which in recent times South Dakota has succeeded. No doubt the latter State has deliberately catered to the divorce trade from the same mercenary motives with which West Virginia, by adopting laws of lax responsibility for directors, has catered to the corporation trade. Popular sentiment long ago shamed Illinois out of its extreme complaisance to divorce, and the cure for any such local and temporary aberration lies in focusing public attention on the abuse. Without adverting specifically to change in statute law, it would seem particularly apt, as illustrating a generally reformed attitude, to quote a few words from a judicial opinion rendered in an appellate court of Illinois in 1891:

"The conviction is forced upon us from a consideration of these circumstances that he [appellee] is a mere sojourner here, till his divorce might be obtained. The statute requiring a residence in this State should have a strict construction, for the sake of the good name of the State if nothing more, and no encouragement should be held out to such as come here away from their homes and the domicile of the defendants to trouble our courts with their marital infelicities. The residence of this defendant (in error) is not *bona fide*, and on the merits he has made out no case." (*Albee vs. Albee*, 45 Ill., App., 370-377.)

Even in South Dakota, the law was amended a few years since by changing the requirement of a residence of ninety days, in order to apply for a divorce, to one of six months, with the further provision that no divorce shall be granted against a non-resident unless the plaintiff shall have resided a year in South Dakota, or the defendant shall have been personally served with process either within or without the State. In view of the Dreyfus case, in which the force of opinion of the outside world compelled a great nation, sorely against its will and much to the mortification of its pride, to right a wrong against a very ordinary individual, Americans may well be confident of the power of public sentiment to correct sporadic eccentricities and immoralities of government. A more serious drawback than the legislative antics of any raw community is the incorrigible Bourbonism of a mature State, like New York, in permitting dissolution of a marriage, whose inception is unassailable, with right to remarry, only for adultery or if one of the spouses has been sentenced to life imprisonment. That policy inevitably

drives its own citizens into other forums to obtain the relief which justice and the average moral sense sanction their seeking. It also indirectly encourages newer States in setting up as divorce Gretna Greens. It is quite significant that, in a large majority of notorious interstate divorce suits, citizens of New York have been interested parties. The record is supplemented by a long list of divorce scandals in the domestic courts of the State. Considering its great population, wealth and general influence, it is not too much to say that New York's obstinate disregard of the preponderance of American sentiment is the principal disturbing factor in the divorce problem.

A uniform law—founded, say, on the existing law of Massachusetts—is a great desideratum, and to procure it is the dream of most divorce reformers. The project is called a dream because of the vast difficulty, both of inertia and positive opposition, in the way of its realization. The late Abram S. Hewitt used to lament that it took at least ten years to accomplish any substantial political improvement in New York City. The writer fears that it will require more than ten years to obtain absolute uniformity of divorce; nevertheless, it is an ideal possible of attainment, and striving after it will at the least achieve incidental benefits. The two rival methods by which the end is aimed at are (1) cooperative State legislation, and (2) the adoption of an amendment of the Constitution of the United States authorizing Congress to pass a general law.

Under the first method the legislatures of all, or practically all, the States would have to be induced independently to enact a statute, identical or substantially similar in terms, prescribing grounds for divorce and procedure for obtaining it. About a dozen years ago, a movement for cooperative State legislation, comprehending marriage and divorce, commercial paper and other subjects, was started and it has continued, though somewhat fitfully, down to the present time. It has accomplished one tangible result of real importance—the adoption of a common Negotiable Instruments Law for twenty-nine States and Territories, including the District of Columbia. On this branch of law there are the most obvious reasons for uniformity, and practically no differences of opinion. Yet action by about three-fifths of the American commonwealths is the sum total of achievement. We are not aware that a single State has adopted

a divorce law framed or suggested in pursuance of the original plan. A national Congress of Divorce met in Pennsylvania a few months ago, at the invitation of Governor Pennypacker, for the single purpose of promoting cooperative legislative uniformity. As far as can be gathered from the reports of its first session, nothing transpired to afford hope of the success of the scheme within any reasonable period of time. A cooperative divorce measure would encounter not only the ordinary inertia, which thus far has withheld two-fifths of the States and Territories from adopting the Commercial Instruments Law, but also the positive opposition of States whose policy was to be changed. Furthermore, it would have to receive universal ratification in order to be of any service. The Negotiable Instruments Law differs in this respect, because, as it is passed in each State, a new increment is added to a uniformity that is always advantageous as far as it goes. If a divorce law were submitted, it would be most readily taken up by those States whose systems it least affected, that is, by the States whose law is now substantially uniform, leaving the States that principally cause embarrassment—those whose law is most strict and most lax—precisely where they are. If one-quarter of the States should hold aloof, the interstate situation would continue materially as it exists. Of course, the increasing sentiment from without would be felt by all States; but, nevertheless, the complete consummation of the movement, in any event, would be an affair of many years and of unremitting, laborious agitation.

Without attempting to minimize the difficulties in the way of the counter-project of Federal Constitutional Amendment, I believe it, on the whole, the more feasible one. There would be a special factor of opposition here from State-rights purists. According to the historical conception of State sovereignty, the function of regulating marriage and divorce belongs more properly to the States than the General Government. Experience has shown, however, that the conflict of laws entails varying personal status and legitimacy of children on different sides of domestic geographical lines. Common sense and the moral sense suggest that these matters in themselves, and, further, as they affect interstate property rights of dower and inheritance, are even more appropriately matters of national cognizance than bankruptcy, for example, over which Congress already has juris-

diction by a clause in the original Constitution. State-rights scruples are by no means as rigorously held as they were a half-century ago, and probably any hostility developing on this score could be overcome. I believe the Constitutional Amendment plan more promising of success chiefly for the reason that the opposition of one-fourth of the States would be futile. All that would be required for Federal legislation would be the adoption by three-fourths of the State legislatures of an Amendment conferring power on Congress to act. Any number of States up to one-quarter, although they refused to acquiesce, would nevertheless be bound by the action of the others. Moreover, as the Amendment itself would be in general terms, no conflict would be aroused as to particular phases of divorce policy, but the issue would be merely on the abstract question whether the subject should be transferred from State to Federal jurisdiction. Congressional legislation, prescribing procedure in the Federal courts, would have the advantage over cooperative State law, in that, according to the usual Federal practice, a plaintiff would probably be compelled to sue a defendant in the latter's residential district, and not compel him to go to a remote State in order to make his defence.

However distant the prospect of systematic and universal reform, the energetic advocacy of either or both of the designs above explained will tend to the awakening of public opinion, and, therefore, probably to the improvement of the present situation by amendments, from time to time, of State laws. In this view, reformers of both schools, in addition to presenting the arguments for their definite scheme, may well strive broadly to educate the sentiment of the people. A general law, however secured, will of necessity embody a compromise between the extreme theories now prevailing. Devout churchmen must be convinced of their duty, as citizens, not to impede the adoption of a more liberal code than their own as the secular law of the land. The legislatures of strict States, like New York, must be impressed with the prevalence of more lenient views in other communities, and importuned to ponder whether the part of essential morality, as well as of practical wisdom, may not lie in treating the civil contract of marriage as one which, while not to be repudiated lightly, or from caprice, still should be dissolvable if either spouse has been guilty of conduct that,

although short of actual adultery, renders continued cohabitation unsafe or reasonably unendurable. States whose statutes afford subterfuges for throwing off the matrimonial yoke, merely because it has become wearisome or distasteful, should, through the ordinary agencies of opinion, be held up to the righteous scorn of the outside world. For a long time to come, the United States will have to get along as best it can under diverse State laws. It may be that, by the time the adoption of a uniform law becomes possible, its actual passage will be largely superfluous, because of the changes in State enactments during the course of the agitation. It is certainly probable that very considerable modifications of State provisions will precede any statute of universal scope resulting from cooperative legislation.

The presumption that independent State authority will hold sway through a long future period gives especial interest to the recent decision of the Supreme Court of the United States in the case of *Haddock vs. Haddock*, which has called forth extensive comment in the press. For an understanding of its scope and effect, certain abstract legal principles must be briefly summarized. Before a court can obtain jurisdiction to entertain a controversy and grant relief, it is necessary that its process, or mandate—variously known as the “summons,” the “subpoena,” etc.—be served upon the defendant. Judgments are divided into two classes—those *in personam* and those *in rem*. A judgment of the former kind is a general adjudication against the defendant, becomes a lien upon his real property and enforceable by execution against his personal property within the territorial jurisdiction of the court, and may be sued on in other jurisdictions, like a personal note, or bond. A judgment *in rem*, on the other hand, binds only the specific property sought to be affected, as, for example, where a mortgage upon real estate is foreclosed, or an admiralty lien is declared against a particular vessel. It is a general rule that, to obtain judgment *in personam*, the defendant must be physically served with the court’s process within the limit of its geographical purview. Judgments *in rem* may be procured through what is known as substituted, or constructive, service—that is, the publication of the process in newspapers, the mailing of copies to the defendant at his last known address, posting in conspicuous places, etc. An important legal controversy concerning divorce is over the

question whether the action is *in personam* or *in rem*. Many courts have laid down a justifiable classification in pronouncing the proceeding one *quasi in rem*. This in plain language means that a suit for divorce is one of special and peculiar character, partaking of the features of both the general divisions. It is contemplated, of course, that the decree shall bind the defendant personally, but it also affects the *rem*, or status of the marriage, thereby incidentally determining dower rights and the legitimacy of children of a subsequent marriage. Nearly all the States, including New York, practically recognize the *quasi in rem* nature of divorces, by providing that they may be obtained by service of process by publication on a non-resident defendant. The interstate *crux* arises as to the authority of a divorce so obtained outside the State where it was granted. Most of the States treat divorces granted in other States on merely constructive service as valid. In his dissenting opinion in *Haddock vs. Haddock*, Mr. Justice Brown shows that the "only States in which it is held that a party domiciled in another State may not obtain a divorce there by constructive service are New York, Pennsylvania, North and South Carolina." South Carolina has always occupied a unique position, having no statute on the subject of divorce whatsoever. North Carolina has very recently taken itself out of the list of recalcitrant States by the decision of its Supreme Court in *Bidwell vs. Bidwell* (52 S. E. Rep., 55). Apparently, therefore, there remain, with the exception of South Carolina, only New York and Pennsylvania, which States, nevertheless, anomalously authorize divorces on constructive service in their own courts.

The various States have proceeded on different theories. Probably the majority of them have upheld divorce judgments of sister States on the ground of comity, reinforced by the consideration of consistency because of their own statutes for constructive service. Other States—notably Rhode Island, in a very forcible opinion by its Supreme Court—have held that a foreign divorce, although on substituted service, is required to be universally recognized under section 1, article iv, of the Constitution of the United States, prescribing that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

New York, with its characteristic attitude of separatism and

obstruction, has systematically refused to treat foreign divorces as binding, and here again its peculiar position has made the Empire State a storm-centre of litigation. The leading case is one in which a man residing in New York, whose wife had obtained a divorce from him in Ohio, upon service by publication, remarried in New York, and the Ohio judgment was so completely ignored that the husband's conviction of bigamy was sustained by the New York Court of Appeals (*People vs. Baker*, 76 N. Y., 78).

The recent decision of the Supreme Court of the United States was on appeal from a New York judgment granting a wife a separation, with alimony. The husband had previously procured an absolute divorce in Connecticut, the service of process being merely constructive. The question was whether New York would be compelled to recognize the Connecticut judgment under the "Full Faith and Credit" clause, and the Supreme Court of the United States has determined, by a bare majority vote of five to four, that the constitutional provision does not apply and that New York is free to continue its peculiar system. The opinions of the Supreme Court are very voluminous and the convictions of the four judges who dissented very vigorously expressed. Mr. Justice Brown regrets "that the court in this case has taken what seems to me a step backward in American jurisprudence, and has virtually returned to the old doctrine of comity, which it was the very object of the 'Full Faith and Credit' clause of the Constitution to supersede." Mr. Justice Holmes is almost equally strong in his deprecation of the decision. The main argument of Mr. Justice White, who wrote for the majority, on the applicability of the "Full Faith and Credit" clause is summarized by Mr. Justice Brown in this language:

"That if one government, by virtue of its authority over marriage, may dissolve the tie as to citizens of another government, that other government would have a similar power, and hence the right of every government over its own citizens might be rendered nugatory by the exercise of the power which every other government possesses."

Mr. Justice Brown answers such position as follows:

"The opinion, however, fails to state the logical result of this proposition, viz., that no divorce would be possible in either State without

a personal service upon the other within the State. If the husband, having his domicile in Connecticut, could not obtain a divorce against his wife domiciled in New York without a personal service, it follows that the wife domiciled in New York could not obtain a divorce against her husband in that State without a personal service there."

In addition, and following out the same idea, it may be suggested, in reply to Mr. Justice White's contention, that, as practically all the States provide for the granting of divorces by substituted service, and as it would be monstrous to presume that each State contemplated the dissolution of the marriage within its own borders only, and, therefore, interstate polygamy, the application of the "Full Faith and Credit" clause in a broad and statesmanlike way would only compel each State to accept for itself what it impliedly assumes to impose upon other States.

As to the future outlook, a few suggestions may be offered. It seems not improbable that this determination by a bare majority vote, the result of which is contrary to the strong preponderance of State court authority, may be overruled after a change in the *personnel* of the bench. Apparently, the probability is greater than it was as to the Income Tax Decision, and fully as great as with regard to the Legal Tender Cases.

The prevailing opinion expressly concedes the right of State courts to recognize foreign divorces through comity, and Mr. Justice Brown calls attention to the fact that the courts of New Jersey, in *Felt vs. Felt* (59 N. J. Eq., 600), have reversed the former attitude of that State, which agreed with that of New York, and now treat as valid a foreign divorce on substituted service, under the doctrine of comity. More recently still, the Supreme Court of North Carolina, as above shown, has made a similar change, not, however, on the ground of comity, but following what it supposed to be the essential doctrine of the Supreme Court of the United States in the earlier decision of *Atherton vs. Atherton* (181 U. S., 155). Mr. Justice Holmes, in his dissenting opinion, concurs with the Supreme Court of North Carolina, believing that the only distinction between *Atherton vs. Atherton* and *Haddock vs. Haddock* rests upon a mere fiction, and, therefore, should not be entertained in a matter of such grave importance.

It may be accepted as settled law that, in the absence of fraud,

any State would be required to recognize a divorce obtained in another State, although for a cause not recognized by the former, if there had been personal service of the process of the Court within the territorial jurisdiction of the forum. It is also settled that, when there has been an actual matrimonial domicile in a State and the wife has abandoned her husband and that State, he may procure a divorce in its courts, on merely substituted service of process, which will be extraterritorially and nationally valid, under the "Full Faith and Credit" clause (*Atherton vs. Atherton, supra*). Furthermore, it does not seem likely that the decision in the *Haddock* case will make any substantial change in legal policies; its main purport is to sanction the continuation of their own policies by New York and other eccentric States. Of course, those States that have proceeded under the Federal Constitution in recognizing foreign divorces are now released from that position, but it seems not improbable that they will incline toward adhering to the former result through comity, especially as the majority opinion itself pointedly leaves the way open on that ground.

In New York and Pennsylvania, pending an agitation to bring them into reciprocal and harmonious relations with other States, it is advisable to advocate legislation on the special subject of legitimacy. However settled the notions of their citizens and courts may be against divorces themselves and the parties to them, it might be feasible to procure the passage of laws declaring that all children shall be legitimate, where their parents have contracted marriage after a divorce of one or both of them, pronounced in any court having jurisdiction of the subject-matter and jurisdiction of the parties according to the local law. We have been glad to notice that, in the discussion of *Haddock vs. Haddock*, the plight of innocent children, whose illegitimacy it has sealed, has been universally commiserated. Their position, at least, should everywhere be set right.

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